

CLLA FALL EDUCATION BONANZA
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Advanced Collection Techniques
Collecting from decedents' estates and trusts, conservatorships and
guardianships

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I. Collecting against decedents in California.

1. Statute of limitations on liability of decedent.

A. Period and accrual. An action which may be brought on a liability of the decedent, whether arising in contract, tort or otherwise, and whether accrued or not accrued, where the applicable limitations period has not expired and the cause of action survives the death of the decedent, may be commenced within one-year after the date of death of the decedent, and the limitations period that would have applied does not apply. *Cal. Code Civ. Proc. sec. 366.2.*

i. Few exceptions. If there is a statute of limitations that is based on death of the defendant, that later or more specific statute may control. *Yeh v. Tai (2017) 227 Cal.Rptr.3d 275.* The doctrine of equitable estoppel may be applied to toll the limitations period under section 366.2 when the decedent's representative has induced a claimant not to file a suit within the limitations period. *Lauter v. Anoufrieva (C.D. Cal. 2009) 642 F.Supp.2d 1060.*

ii. Notice not relevant. A creditor may be entitled to notice of estate administration, and notice of death may be published in the city where the decedent resided. However, the Creditor may not receive notice or be aware of publication.

iii. Practice tip: Keep in contact with your debtor more frequently than annually.

- iv. Tolling the statute. The filing of a Creditor's Claim (see below) tolls the statute until allowance, approval, or rejection. *Cal. Prob. Code sec. 9352.*
- v. No authority to pay barred claim. A personal representative has no authority to pay a debt where a claim is barred by the statute of limitations. *Cal. Prob. Code sec. 9253.*

B. Cannot sue decedent – must name personal representative (Administrator or Executor). A decedent cannot be served or appear in an action, and therefore there must be someone with legal authority to accept service and to defend an action. The authority can only be conferred by the Probate Court. Therefore, a suit against decedent, or against the personal representative in their individual (not representative) capacity, is subject to dismissal.

C. Personal representative has no authority until the Court issues Letters of Administration or Letters Testamentary.

D. Creditor opening a probate estate. If a probate estate is not opened, you cannot file a Creditor's Claim (see below). For the Creditor's Claim to be filed before the one-year statute of limitations runs, a probate case must be opened. A Creditor has standing to open a probate estate. The petition for probate or petition for administration must be filed before the one-year statute of limitations runs.

- i. In addition, the Creditor's Claim must be filed, and served on the person who will become personal representative, before the one-year statute of limitations runs. The identity of that person may not be known, or a copy of the Will may not be available, at the time the petition is filed. The Creditor may have to file an ex parte petition to appoint themselves as Special Administrator for the purpose of receiving the Creditor's Claim.
- ii. Practice tip: Leave yourself at least 90 days before the one-year statute of limitations runs to open a probate administration or to have the Creditor appointed as Special Administrator.

2. Decedent's spouse. The surviving spouse is personally liable for the debts of the deceased spouse to the extent of the fair market value of property passing to the surviving spouse without administration, less any liens or encumbrances. *Cal. Prob.*

Code secs. 13550, 13551. Funeral expenses and expenses of last illness are excepted. *Cal. Prob. Code* section 11446. The decedent's debts may be enforced against the surviving spouse in the same manner as against the decedent before death, subject to the same defenses, cross-claims and setoff, and the one-year statute of limitations applies. *Cal. Prob. Code* section 13554. If a probate administration is commenced for the decedent, an action against the spouse must be filed and served before the end of the Creditor's Claim filing period (unless spouse acknowledges liability in writing or Creditor has filed a claim in the probate estate proceeding). *Cal. Prob. Code* section 13552.

3. Decedent's probate estate.

A. Creditors Claim procedure.

- i. Claim. A Claim is a demand for payment whether or not: due, accrued, contingent, liquidated, or unliquidated. Payment includes liability of decedent, whether arising in contract, tort, or otherwise, and liability for funeral expenses. *Cal. Prob. Code* section 9000.
- ii. Filing and Service in open administration. A statutory Creditor's Claim form is mandatory and must be filed with the Court, and served on the personal representative, or the person who later becomes personal representative. To file the form, there must be an open case. *Cal. Prob. Code* section 9000 et seq.

Note: Do not count on a personal representative treating a written demand for payment as a Creditor's Claim.

- a. A Creditor's Claim may be amended to state a higher amount if filed before the time for filing a claim has expired. *Cal. Prob. Code* sec. 9104, subs. (a), (b). No amendment or revision is permitted after the earlier of (1) the time the Court makes an order for final distribution of the estate or (2) one year after Letters are first issued to a general personal representative. These times do not extend the one-year statute of limitations. *Cal. Prob. Code* sec. 9104, subd. (c).
- b. An amendment specifying the amount of a claim that, at the time it was filed, was not due, was contingent, or was not yet ascertainable, is not an increase in the

amount of a claim. *Cal. Prob. Code* sec. 9104, subd. (b).

iii. Contents of Claim. The claim form is signed by the Creditor under penalty of perjury, and must set forth facts supporting the claim, with supporting documentation. If the claim is based on a written instrument, a copy must be attached to the claim form. *Cal. Prob. Code* secs. 9151-9153.

a. The Claim Form is a declaration. Consider having the custodian of records or other qualified witness sign a declaration that is attached to the claim form. The supporting documentation should be authenticated as business records, to meet the Business Records Exception to the hearsay rule (*Cal. Evid. Code* sec. 1271):

- (1) Writing made in regular course of business.
- (2) Writing made at or near time of act, condition, or event.
- (3) Testimony by custodian or qualified witness as to identity and mode of preparation.
- (4) Sources of information and method and time of preparation indicate trustworthiness.

iv. Deadlines. A Creditor's Claim must be filed before the later of (1) four months after the date that Letters are issued to a general personal representative (not a Special Administrator) or (2) 60 days after the date notice of administration is mailed or personally delivered to the creditor. *Cal. Prob. Code* sec. 9100, subd. (a). A Creditor's Claim must be served within the later of 30 days after the claim is filed or four months after Letters issue to a personal representative with general powers (not a Special Administrator). *Cal. Prob. Code* sec. 9150, subd. (c). A Creditor's Claim that is not timely filed and timely served is barred and invalid. *Cal. Prob. Code* secs. 9002, subd. (b) and 9150, subd. (d).

Note: None of these dates extends the one-year statute of limitations in *Cal. Code Civ. Proc.* sec. 366.2. *Cal. Prob. Code* sec. 9100, subd. (c).

a. Liability of personal representative for failure to give notice. The Creditor may file a noticed petition to

determine the personal representative's liability for failure to give notice if the Creditor demonstrates the failure was in bad faith, the Creditor had no actual knowledge of the administration before the time for filing a claim, payment would have otherwise been made, and the petition is filed within 16 months after Letters were issued to a general personal representative. *Cal. Prob. Code* sec. 9053.

v. Leave to file late claim.

a. Upon a noticed petition filed by the Creditor, the Court may allow a late claim to be filed if either:

(1) the personal representative failed to send proper and timely notice of administration to the creditor, and the petition for leave to file late claim is filed within 60 days after the Creditor has actual knowledge of the administration of the estate, or

(2) the Creditor had no knowledge of the facts reasonably giving rise to the existence of the claim more than 30 days prior to the Claim filing deadline, and the petition for leave to file late claim is filed within 60 days after the Creditor has actual knowledge of both:

(A) the existence of facts reasonably giving rise to the existence of the claim, and

(B) the administration of the estate. *Cal. Prob. Code* sec. 9103, subd. (a).

b. The Court cannot allow a claim to be filed after it has made an order for final distribution of the estate. *Cal. Prob. Code* sec. 9103, subd. (b).

c. If the Court does grant leave, it may condition the claim on just and reasonable terms. The Court may also deny the petition if payment to general creditors has been made and it appears the filing of the claim would cause or tend to cause unequal treatment among creditors. *Cal. Prob. Code* sec. 9103, subd. (c).

- d. Payments made before a late claim is filed are not subject to the claim. *Cal. Prob. Code* sec. 9103, subd. (d).

Note: None of these dates extends the one-year statute of limitations in *Cal. Code Civ. Proc.* sec. 366.2. *Cal. Prob. Code* sec. 9103, subd. (f).

- vi. No authority to pay in absence of timely claim. A personal representative has no authority to pay a debt where a Creditor's Claim is required but it has not been timely filed and served.
- vii. Judgments. Judgments against the decedent are subject to the Creditor's Claim procedure. Judgments against the decedent cannot be enforced against estate property under the Enforcement of Judgments Law. *Cal. Prob. Code* sec. 9300.
- a. Partial exception: Execution lien and deficiency. If decedent's property is subject to an execution lien at the time of death, enforcement may proceed. **But if the judgment is not satisfied by that execution, the unsatisfied balance of the judgment is payable in the course of administration and will require a Creditor's Claim to be timely filed and served.** *Cal. Prob. Code* sec. 9303.
- b. Exception: Judgment against personal representative in representative capacity. When a Creditor has a judgment against the personal representative acting as such, and not against the decedent, such a judgment is not subject to the claims procedure. The judgment shall provide that it is payable out of property in the decedent's estate in the course of administration. *Cal. Prob. Code* sec. 9301.
- c. Exception: Judgment for possession or sale and deficiency. A judgment for possession or sale of specific property may proceed to be enforced without filing a creditor's claim. **But if the judgment is not satisfied by that property, the unsatisfied balance of the judgment is payable in the course of**

administration and will require a Creditor's Claim to be timely filed and served. *Cal. Prob. Code sec. 9302.*

- d. Exception: Attachment lien. An attachment lien may be converted into a judgment lien against property in the estate subject to the attachment lien, with the same priority, if either (1) the judgment debtor dies after entry of judgment in the action in which the property was attached, or (2) a judgment is entered, after the defendant's death, in an action in which the property was attached. *Cal. Prob. Code sec. 9304.*

viii. Claims in litigation.

- a. No action pending. If no action is pending, the claims procedure applies. *Cal. Prob. Code sec. 9350.*
- b. **No action can be commenced without filing of Creditor's Claim.** An action may not be commenced against the personal representative on a cause of action against the decedent unless a claim is filed and rejected in whole or in part. *Cal. Prob. Code sec. 9351; Cal. Code Civ. Proc. sec. 377.40.*
- c. Action pending. An action or proceeding pending against the decedent at the time of death may not be continued against the decedent's personal representative unless all these conditions are satisfied, and no recovery shall be allowed in the action against the estate unless proof of compliance with this section is made:
- (1) a Creditor's Claim is filed.
 - (2) The claim is rejected in whole or in part.
 - (3) Within three months after notice of rejection is given, the plaintiff applies to the Court in which the action is pending for an order to **substitute** the personal representative in the action. This time limit applies only if the notice of rejection states that the plaintiff has three months in

which to apply for that order. *Cal. Prob. Code* sec. 9370; *Cal. Code Civ. Proc.* sec. 377.41.

- ix. Litigation where no claim required.
- a. Liability covered by insurance. An action may proceed without a claim, but only to the extent of coverage or limits. **An action to establish liability for damages beyond coverage or limits requires the filing of a Creditor's Claim.** *Cal. Prob. Code* sec. 9390.
- b. Mortgage or other lien. A lienholder may commence an action to enforce the lien against property of the estate subject to the lien, without filing a claim, if the complaint states that the holder expressly waives all recourse against other property in the estate. *Cal. Prob. Code* sec. 9391.

Note: The one-year statute of limitations does not apply.

Note: **The personal representative can file a petition to enjoin enforcement of the lien.** *Cal. Prob. Code* sec. 9391. This is commonly seen in a petition to stay the foreclosure of a lien against real property. If the sale of the property will satisfy the amount secured by the lien, the Court is likely to stay the foreclosure.

(1) Personal liability of distributee. Under certain circumstances a person to whom estate property is distributed may be personally liable to the Creditor for the unsatisfied portion of the debt, but this may not extend to a bona fide purchaser or encumbrancer in good faith and for value. *Cal. Prob. Code* sec. 9392.

- x. Allowance or Rejection. Allowance may be made in whole or in part, and any allowance or rejection must be made in writing. *Cal. Prob. Code* sec. 9250, subds. (a), (b). The personal representative has 30 days after the claim is filed to act on the claim. Thereafter the Creditor may treat the failure

to act as a notice of rejection given on the 30th day. *Cal. Prob. Code* sec. 9256.

- xi. Interest and priority. Where the Court orders debts to be paid, interest on the debt accrues from that date at the legal rate on judgments or at the rate specified in a contract. *Cal. Prob. Code* sec. 11423. The personal representative is personally liable, and on the surety bond, for failure to make the ordered payment. *Cal. Prob. Code* sec. 11424. The priority for payment that applies before death generally applies in probate administration. The order of priority is expenses of administration, secured obligations, funeral expenses, expenses of last illness, family allowance as approved by the Court, wage claims, and then general debts. *Cal. Prob. Code* sec. 11420.
- xii. Suit on rejected claim. A rejected claim is **barred** unless the Creditor commences an action on the claim (including reference or arbitration) within 90 days after notice of rejection is given of a claim that is due at that time notice is given, or within 90 days after the claim becomes due if the claim is not due at the time notice is given. *Cal. Prob. Code* sec. 9354.

B. Assets of the Estate – Assets which are subject to administration in probate are the assets of the probate estate.

- i. This does not include decedent's joint tenancy interest, assets subject to beneficiary designations, pay on death or transfer on death account.

4. Non-probate transfers where distributee may be liable. Where decedent's property passes to heirs, beneficiaries, or successors without probate administration, such as by a spousal property petition or a small estate affidavit, the distributee may be personally liable for the debts to the extent of the property. However, an action to enforce that debt requires the filing and service of a Creditor's Claim, and the one-year statute of limitations applies. *Cal. Prob. Code* secs. 13109, 13156, 13204 and 13554.

A. Revocable Transfer on Death (TOD) Deeds (*Cal. Prob. Code* secs, 5600-5696). This is a method to transfer real property on death without probate. The beneficiary takes the property subject to any existing liens and encumbrances, and is personally liable for any

unsecured debts that could have been asserted against the decedent (e.g., within the one-year statute of limitations, filing of Creditor's Claim, etc.). *Cal. Prob. Code* sec. 5672.

- i. The liability of the distributee is limited to the fair market value of the property received, less existing liens and encumbrances, plus net income received, and if sold, interest on the fair market value from the date of distribution at the legal rate on money judgments (10%). *Cal. Prob. Code* sec. 5674.
- ii. **Restitution of property.** The personal representative of the probate estate may demand restitution of the property or its value to the probate estate, with adjustments, for up to three years following the transferor's death. This means an estate that is otherwise insolvent and that cannot satisfy all Creditor's Claims may be able to reclaim property transferred by a TOD deed, and sell it to raise cash to pay creditors. Therefore, a creditor would have the right to demand that the personal representative do so, or to seek a Court order requiring this. *Cal. Prob. Code* sec. 5676.

- B. Joint tenancy property - creditors have no rights in the joint tenancy property after the debtor dies. This is true even if the creditor had a judgment lien or even an execution lien on the joint tenancy property, but the lien has not resulted in an execution sale before the joint tenant's death. *Grothe v Cortlandt Corp.* (1992) 11 Cal.App.4th 1313.

5. Decedent's revocable inter vivos trust.

- A. **Trust property subject to claims of creditors of probate estate.** The decedent's property that was subject to the power of revocation, in other words, held by the decedent as trustee of their revocable inter vivos trust, is subject to the claims of the creditors of the probate estate. *Cal. Prob. Code* sec. 19001, *Dobler v. Arluk Medical Center Industrial Group, Inc.* (2001) 107 Cal.Rptr.2d 478, 89 Cal.App.4th 530. This does not affect the creditor's right to recover from the decedent's revocable trust. *Cal. Prob. Code* sec. 19002. However, the Creditor's Claim procedure and one-year statute of limitations still applies to any action on the liability of the decedent. *Ibid.* Therefore, Creditors are required to seek recovery from the probate

estate first. If the personal representative has published notice of death and given notice of administration to creditors, the trustee and beneficiaries are entitled to the same protection from creditors as afforded the personal representative. *Cal. Prob. Code* sec. 19006, subd. (b).

Note: If the Trustee pays a debt, he or she has a right to collect from the probate estate the amount that would otherwise have been paid from property of the probate estate. *Cal. Prob. Code* sec. 19006, subd. (c).

- i. No probate estate pending. If no probate estate is pending, and the Trustee does not elect the Creditor's Claim procedure (see below), "then the liability of the trust to any creditor of the deceased settlor shall be as otherwise provided by law." *Cal. Prob. Code* sec. 19008.

Practice tip: If there is no probate administration pending, file a petition to appoint a special administrator to receive the Creditor's Claim. After appointment of the special administrator, file and serve the Creditor's Claim. After 30 days, you may treat the claim as rejected, and file an action against the Trustee. You will have to demonstrate that the probate estate is inadequate to satisfy the claim. Remember that the one-year statute of limitations still applies, but the filing of the Creditor's Claim tolls the statute.

- ii. A judgment against a trustee is satisfied from the trust's remaining assets. Distributions may be made to beneficiaries before debts or judgments are paid. *Cal. Prob. Code* sec. 19301.

B. Elective Creditors Claim procedure for revocable trusts only.

- i. At any time after decedent's passing, where no petition for probate administration has been filed, the trustee can file a proposed notice to creditors with the Probate Court in the County where the decedent resided at the time of passing, or where trust property is located or where the Trust is being administered. *Cal. Prob. Code* sec. 19003.

- a. The Court will issue a proceeding number, and the trustee must publish and serve the notice to creditors of the decedent.
 - b. The Trustee is not required use the Creditor's Claim procedure. *Cal. Prob. Code* sec. 19010.
- ii. After the Trustee publishes and serves the notice to creditors as above, the Creditors' Claim process applies just as it does in probate estates (see rules listed above), *e.g.*, creditors must file claims, claims not filed are barred from collection from trust assets, and a creditor may not sue the trustee on the debt unless the claim is filed first, etc. *Cal. Prob. Code* secs. 19004, 19100-19104, 19150-19154, 19250-19255, 19300-19304, 19320-19326, 19330, 19400-19403.
 - iii. Just as in a probate estate, the Trustee can pay, reject, contest, and settle any claim, including by filing a petition. *Cal. Prob. Code* sec. 19005.
 - iv. Distributee liability applies as in probate estate matters. *Cal. Prob. Code* sec. 19400-19403.

II. Collecting against Conservatees, and Guardianships for Minors, in California.

1. Judgments. Property in a conservatorship or guardianship is not subject to enforcement of a money judgment. The judgment creditor may apply to the Court where the proceeding is pending for an order requiring payment of the judgment. *Cal. Code Civ. Proc.* secs. 709.030 and 699.720.
 - a. This prohibition extends to execution levies commenced before the appointment of a conservator. *Neiman Marcus v. Tait* (1995) 33 Cal.App.4th 271, 39 Cal.Rptr.2d 143 (enforcement of judgment procedures do not apply to property in a conservatorship estate).
2. Debts incurred **after** a conservator is appointed. The guardian or conservator is required to pay lawful debts incurred by the ward or conservatee **during** the conservatorship or guardianship (after appointment of guardian of conservator) to provide the necessities of life to the ward or conservatee, and to their spouse and minor children, to the extent the debt is reasonable (and basic living expenses to conservatee's domestic partner as reasonably incurred). *Cal. Prob. Code* sec. 2430, subd. (a)(2).

- a. Any other debts incurred during the conservatorship by the conservatee under a Court order allowing him or her to do so, but only if they do not impair the ability of the conservatorship estate to provide the necessities of life to the conservatee and their spouse and minor children (and basic living expenses to conservatee's domestic partner). *Cal. Prob. Code* sec. 2430, subd. (b).
- b. If a conservator fails to pay a debt, expense, or charge lawfully due and payable by the conservatee or the estate, a creditor may file a petition for an order that the conservator pay the debt from the conservatorship estate. *Cal. Prob. Code* sec. 2404. That petition can also be used to determine the validity of the debt, or that it was reasonable or for the necessities of life.

Note: The conservator can argue that the debt should not be paid now because it would impair the conservator's ability to provide necessities of life to the conservatee and their dependents. *Cal. Prob. Code* 2430.

- i. When filing a petition, the creditor will provide documentation substantiating the claim.
 - ii. A creditor can also bring a civil action against the Conservator to recover the debt.
3. Debts incurred before a conservator or guardian is appointed. The guardian or conservator is required to pay lawful debts incurred by the ward or conservatee **before** the creation of the conservatorship or guardianship (appointment of guardian of conservator). *Cal. Prob. Code* sec. 2430, subd. (a)(1).
- a. A conservator is required to pay debts incurred before a conservator or guardian is appointed without regard to whether the payment would impair the ability of the conservatorship estate to provide the necessities of life. *Conservatorship of Parker* (2014) 228 Cal.App.4th 803 (debt for tort incurred at the time the tort occurred).
 - b. Consider the nature of the debt, when it was incurred, and how it is to be satisfied. For example, a person who borrows money secured by real property pursuant to a non-recourse loan is liable only to the extent of the property. A conservator is later appointed for that person. Since the money was borrowed before the conservator was

appointed, the debt was incurred before the conservator was appointed. However, the loan is a non-recourse loan and therefore the lender is unable to collect the attorney's fees against the other assets of the conservatorship estate.

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